

# State Office of Administrative Hearings



Cathleen Parsley  
Chief Administrative Law Judge

February 9, 2011

Les Trobman, General Counsel  
Texas Commission on Environmental Quality  
P.O. Box 13087  
Austin Texas 78711-3087

Re: **SOAH Docket No. 582-10-4853; TCEQ Docket No. 2009-1334-PST-E, In Re:  
D.C.T.D., Inc., d/b/a Boomers**

Dear Mr. Trobman:

The above-referenced matter will be considered by the Texas Commission on Environmental Quality on a date and time to be determined by the Chief Clerk's Office in Room 201S of Building E, 12118 N. Interstate 35, Austin, Texas.

Enclosed are copies of the Proposal for Decision and Order that have been recommended to the Commission for approval. Any party may file exceptions or briefs by filing the documents with the Chief Clerk of the Texas Commission on Environmental Quality no later than **March 1, 2011**. Any replies to exceptions or briefs must be filed in the same manner no later than **March 11, 2011**.

This matter has been designated **TCEQ Docket No. 2009-1334-PST-E; SOAH Docket No. 582-10-4853**. All documents to be filed must clearly reference these assigned docket numbers. All exceptions, briefs and replies along with certification of service to the above parties shall be filed with the Chief Clerk of the TCEQ electronically at <http://www10.tceq.state.tx.us/epic/efilings/> or by filing an original and seven copies with the Chief Clerk of the TCEQ. Failure to provide copies may be grounds for withholding consideration of the pleadings.

Sincerely,

A handwritten signature in black ink, appearing to read "Kerrie Jo Qualtrough".

Kerrie Jo Qualtrough  
Administrative Law Judge

KJQ/llg  
Enclosures  
cc: Mailing List

STATE OFFICE OF ADMINISTRATIVE HEARINGS

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AGENCY: Environmental Quality, Texas Commission on (TCEQ)

STYLE/CASE: D.C.T.D. INC / BOOMERS

SOAH DOCKET NUMBER: 582-10-4853

REFERRING AGENCY CASE: 2009-1334-PST-E

STATE OFFICE OF ADMINISTRATIVE  
HEARINGS

ADMINISTRATIVE LAW JUDGE

ALJ KERRIE QUALTROUGH

REPRESENTATIVE / ADDRESS

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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

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PRESIDENT  
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SAN ANGELO, TX 76904

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D.C.T.D., INC. D/B/A BOOMERS

**SOAH DOCKET NO. 582-10-4853  
TCEQ DOCKET NO. 2009-1334-PST-E**

**EXECUTIVE DIRECTOR OF THE  
TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY**

**v.**

**D.C.T.D., INC. d//b/a BOOMERS,  
Respondent**

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**BEFORE THE STATE OFFICE**

**OF**

**ADMINISTRATIVE HEARINGS**

**PROPOSAL FOR DECISION**

**I. INTRODUCTION**

The Executive Director (ED) asks the Texas Commission on Environmental Quality (Commission or TCEQ) to assess an administrative penalty against the Respondent, D.C.T.D., Inc. d/b/a Boomers, for violations of the TCEQ's rules regarding underground storage tanks (USTs). Respondent did not contest that the alleged violations occurred, but argued that the recommended penalty imposed an undue hardship on such a small business. The Administrative Law Judge (ALJ) recommends that the Commission assess an administrative penalty of \$8,868 against Respondent with a three-year payout.

**II. PROCEDURAL HISTORY AND JURISDICTION**

The hearing convened on October 28, 2010, before ALJ Kerrie Jo Qualtrough in the William P. Clements Building, 300 West 15th Street, Fourth Floor, Austin, Texas. The ED was represented by Phillip M. Goodwin, P.G., Attorney, Litigation Division. Nancy Farmer and Dan Farmer appeared by telephone to represent the Respondent. The hearing was reconvened on January 5, 2011, to take additional evidence and the record closed on that day. Jurisdiction and notice were not disputed and these issues are addressed in the findings of fact and conclusions of law in the Proposed Order without further discussion here.

### III. DISCUSSION

#### A. Violations

Respondent owns and operates three USTs and a convenience store located at 2330 Sherwood Way, San Angelo, Texas. The USTs at the store are not exempt or excluded from regulation and contain a regulated petroleum substance.<sup>1</sup>

On July 16, 2009, the ED inspected the store and tanks and found multiple violations. Based on this inspection, the ED alleged that Respondent violated the following laws:

TEX. WATER CODE § 26.3475(a), (c)(1), (c)(2), and (d);  
30 TEX. ADMIN. CODE (TAC) § 334.49(b)(2) and (c)(4);  
30 TAC § 334.50(b)(1)(A), (b)(2)(A)(i)(III), (b)(2)(A)(ii), and (d)(1)(B)(ii);  
30 TAC § 334.51(a)(6); and  
30 TAC § 334.45(c)(3)(A).<sup>2</sup>

The Respondent stated at the evidentiary hearing that it is not contesting the facts of the case and conceded that the violations occurred, albeit by mistake. Therefore, the ALJ takes the facts as stated in the ED's Preliminary Report and Petition (EDPRP) as true.

#### B. Corrective Action and Administrative Penalties

In his EDPRP, the ED requested that the Commission require Respondent to pay \$9,450 in administrative penalties and to take corrective action to bring the USTs into compliance with state law. At the hearing, the ED stated that Respondent had brought the USTs into compliance and the ED was no longer seeking corrective action.

Under TEX. WATER CODE § 7.051, the Commission is authorized to assess an administrative penalty against a person who violates a provision of the Water Code or the rules adopted by the Commission. The penalty may not exceed \$10,000 per day of violation of the applicable law. A

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<sup>1</sup> ED Ex. A, EDPRP ¶ 8.

<sup>2</sup> ED Ex. A, EDPRP ¶ 9.

respondent has the burden of proof regarding its financial inability to pay the recommended administrative penalty. 30 TAC § 70.8.

Wallace Myers testified on behalf of the ED regarding the recommended administrative penalty given the violations in this case. Although the ED requested a \$9,450 administrative penalty in his EDPRP,<sup>3</sup> Mr. Myers testified that the appropriate penalty was \$8,868 as shown in his revised Penalty Calculation Worksheet.<sup>4</sup> The ED recalculated the penalty to recognize Respondent's good faith efforts in complying with the enforcement action. Respondent did not cross-examine Mr. Myers regarding his penalty calculations.

Respondent submitted financial information to the ED for a financial analysis of its ability to pay and Rob Norris of the ED's staff testified regarding his review. He stated that pursuant to TCEQ policy, Respondent was not eligible for a review of its ability to pay the recommended penalty. The TCEQ policy provides that if the penalty is less than one percent of annual gross revenues or less than \$3,601, then a respondent is not eligible for such a review and the ED will not perform the financial analysis.<sup>5</sup>

In this case, Mr. Norris reviewed Respondent's 2009 tax return, which showed that it had gross receipts of \$953,036. One per cent of Respondent's gross receipts is \$9,530, which exceeds the recommended penalty of \$8,868. Therefore, Mr. Norris testified that Respondent was ineligible for a financial review of its inability to pay because the recommended penalty was less than one per cent of Respondent's gross revenues.

Mr. Farmer testified on behalf of Respondent. He stated that the Respondent is a "mom and pop" convenience store run by a single woman who receives a salary of \$24,000 per year. Although the store was once very profitable, it has seen its gasoline sales decline every year because of the competition from new, large retailers such as HEB and Sam's. Respondent started selling lottery

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<sup>3</sup> ED Ex. A, EDPRP, ¶ 14.

<sup>4</sup> ED Ex. 6.

<sup>5</sup> ED Ex. 13, pg. 1.

tickets as a way to compete and attract customers to the store. Respondent maintains that it is a very small business and paying an administrative penalty of \$8,868 is a financial hardship. Respondent points out that there was no environmental impact, the violations were not intentional, and the USTs are now in compliance. Mr. Farmer stated that if such a large penalty is imposed, the store will have to be closed.

Regarding the TCEQ's policy on eligibility for an inability to pay review, it is Respondent's position that determining whether a respondent is eligible for such a review based solely on its gross revenues is not appropriate. Respondent argues that this policy fails to consider a store's profitability and treats large and small stores alike.

Regarding Respondent's ability to pay, much of the store's revenue comes from lottery games and the gross receipts on its tax return include the store's total lottery sales. However, Respondent only earns a five per cent commission on the total lottery sales. Therefore, using the actual amount of the lottery sales in a financial analysis tends to inflate the sales figures since the store only earns a five per cent commission on those sales.

To support its argument that the recommended penalty would create an undue hardship for the store, Respondent introduced a profit and loss statement (P/L statement) for 2009.<sup>6</sup> In the course of its business, Respondent prepares such documents for its own use. This 2009 P/L statement contained the following information:

Merchandise and gas sales	\$513,184
Cost of sales	(459,204)
Gross profit	53,980
Other income (lottery, rebates, game income, hot check collected)	82,584
<b>Total Store Income</b>	<b>\$136,560<sup>7</sup></b>
<b>Total Expenses</b>	<b>(132,444)</b>
<b>Total Income for 2009</b>	<b>\$4,116</b>

<sup>6</sup> Resp. Ex. 1; ED Ex. 14.

<sup>7</sup> Total Store Income should be \$136,564.

It is Respondent's position that the total income of \$4,116 should be the basis of any determination of the recommended penalty, not its gross revenues. According to Respondent, such a large penalty presents an undue hardship on such a small operation that has seen consistently declining sales and profitability.

In rebuttal, Mr. Norris testified that the Commission has not adopted separate policies to determine a respondent's ability to pay a penalty based on the size or profitability of the respondent. Therefore, penalties are calculated consistently, without regard for the size of the corporation or the amount of the profit made by a respondent.

In addition, Mr. Norris also reviewed Respondent's 2009 P/L statement and compared it to its 2009 tax return. Mr. Norris testified that when there are discrepancies between the financial documents, he relies on the federal tax return, which he considers to be more reliable. However, Mr. Norris also reviewed the 2009 P/L statement. According to Mr. Norris, the ED reviews a respondent's cash flow for a three-year period to determine whether it has the ability to pay a particular penalty. The Respondent's P/L statement shows a total income for 2009 of \$4,116. Assuming a similar cash flow of \$4,116 every year for three years, Respondent would have a total income of over \$12,000 for that three-year period. This is greater than the recommended penalty of \$8,868. Mr. Norris testified that a payment plan allowing Respondent to pay the penalty over three years would be acceptable.

### **C. Analysis**

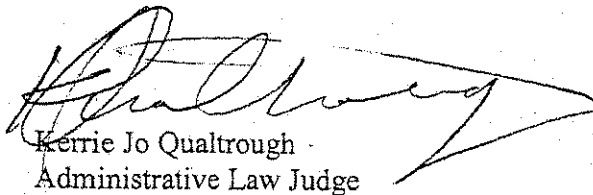
Respondent takes two positions regarding the amount of the administrative penalty, but does not dispute the ED's calculations. First, Respondent submitted information to the ED for a financial analysis to determine whether Respondent was unable to pay the recommended penalty. Second, Respondent argued at the hearing that the amount of the penalty is an undue hardship for such a small, "mom and pop" store. After reviewing the evidence, the ALJ concludes that the calculation of the penalty followed the ED's practice of computing such penalties and the penalty is appropriate in this case.

Regarding Respondent's position on TCEQ's policy of relying on gross revenues without regard for a respondent's profitability, the ALJ declines to express an opinion on whether that policy is sound. The evidence in the record shows that the Commission approved this policy, which the ED implemented in other enforcement cases.

Regarding Respondent's ability to pay the penalty, the ED followed the TCEQ's practice of first determining whether a respondent is eligible for such a review. The ALJ concludes that the ED followed its policy and properly determined that based on the gross receipts shown on its 2009 tax return, Respondent was ineligible for a financial analysis of its inability to pay.

Nevertheless, as urged by Respondent, the ED also considered Respondent's profitability as shown on the 2009 P/L statement. The evidence demonstrates that Respondent has an ability to pay the recommended penalty of \$8,868 over a three-year period. The ALJ recognizes that the same penalty for the same violations may impose a greater burden on a small business than on a larger, more profitable one. Nevertheless, the TCEQ's practices were followed in this case and the recommended penalty of \$8,868 was properly calculated. The ALJ recommends that the Commission require Respondent to pay \$2,895.33 each year for three years.

**SIGNED** February 9, 2011.

  
Kerrie Jo Qualtrough  
Administrative Law Judge



# TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



## **AN ORDER Assessing Administrative Penalties Against D.C.T.D, Inc. d/b/a Boomers TCEQ Docket No. 2009-1334-PST-E SOAH Docket No. 582-10-4853**

On \_\_\_\_\_, the Texas Commission on Environmental Quality (TCEQ or Commission) considered the Executive Director's (ED's) Preliminary Report and Petition (EDPRP) recommending that the Commission enter an order assessing administrative penalties against D.C.T.D., Inc. d/b/a Boomers (Respondent). A Proposal for Decision (PFD) was presented by Kerrie Jo Qualtrough, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH).

After considering the ALJ's PFD, the Commission adopts the following Findings of Fact and Conclusions of Law:

### **I. FINDINGS OF FACT**

1. D.C.T.D., Inc. d/b/a Boomers (Respondent) owns and operates three underground storage tanks (USTs) and a convenience store with retail sales of gasoline located at 2330 Sherwood Way, San Angelo, Tom Green County, Texas (the "Facility"). The USTs at the Facility are not exempt or excluded from regulation under the Texas Water Code or the rules of the Commission. Respondent's USTs contain a regulated petroleum substance as defined in the rules of the Commission.
2. A TCEQ San Angelo Regional investigator conducted an investigation of Respondent on July 16, 2009 and documented violations of UST regulations.

3. Respondent failed to electrically isolate UST system components from the corrosion elements of the surrounding soil, back fill, groundwater, and/or other metallic components. Specifically, the submersible turbine pumps were partially covered with soil.
4. Respondent failed to have the cathodic protection system inspected and tested for operability and adequacy of protection at a frequency of at least once every three years. Specifically, the triennial test had not been conducted.
5. Respondent failed to monitor USTs for releases at a frequency of at least once every month (not to exceed 35 days between each monitoring).
6. Respondent failed to test the line leak detectors at least once per year for performance and operational reliability.
7. Respondent failed to provide proper release detection for the pressurized piping associated with the USTs. Specifically, the annual piping tightness test was not conducted.
8. Respondent failed to conduct reconciliation of detailed inventory control records at least once each month, sufficiently accurate to detect a release as small as the sum of 1.0 per cent of the total substance flow-through for the month plus 130 gallons.
9. Respondent failed to ensure that all spill and overfill prevention devices are maintained in good operating condition. Specifically, the spill buckets were filled with debris and the spill bucket lid at tank #3 was broken.
10. Respondent failed to install an emergency shutoff valve (also known as a shear or impact valve) on each pressurized delivery or product line and to ensure that it was securely anchored at the base of the dispenser. Specifically, the shear valves were not properly secured.

11. Respondent received notice of the violations on or about August 3, 2009.
12. The Commission has adopted a Penalty Policy, effective September 1, 2002, setting forth its policy regarding the computation and assessment of administrative penalties.
13. The ED recommended that the Commission enter an enforcement order assessing a total administrative penalty of \$8,868 against Respondent.
14. The \$8,868 administrative penalty sought is the accumulation of the penalties assessed for each violation, calculated in the manner provided by the Penalty Policy.
15. On April 15, 2010, the ED mailed the EDPRP to Respondent at 12409 Twin Lakes Lane, San Angelo, Texas 76904.
16. On May 6, 2010, Respondent filed an answer to the EDPRP and requested a hearing.
17. On June 14, 2010, the ED referred this matter to SOAH for a contested case hearing.
18. On June 24, 2010, the Commission's Chief Clerk mailed notice of the preliminary hearing scheduled for January 28, 2010, to Respondent at 12409 Twin Lakes Lane, San Angelo, Texas 76904, and P.O. Box 62453, San Angelo, Texas 76906.
19. The notice of hearing stated the time, date, place, and nature of the hearing, stated the legal authority and jurisdiction for the action, set forth the alleged violations, and advised Respondent, in at least twelve-point bold-faced type, that failure to appear at the preliminary hearing or the evidentiary hearing in person or by legal representative would result in the factual allegations contained in the notice, and attached EDPRP, being deemed as true, and the relief sought in the notice possibly being granted by default.
20. On July 16, 2010, the ED and Respondent filed a "Joint Motion to Waive Appearance at Preliminary Hearing," containing a proposed hearing schedule, which the ALJ adopted.
21. The hearing on the merits was held on October 28, 2010 and January 5, 2011, in Austin, Texas. Both parties participated in the hearing.

22. Respondent did not dispute the facts alleged in the EDPRP and conceded that the violations occurred.
23. Respondent did not dispute that the recommended administrative penalty in the revised Penalty Calculation Worksheet was correctly calculated in accordance with the Penalty Policy.
24. Respondent asserted that it was unable to pay the recommended administrative penalty and that it presented an undue hardship on a small business.
25. Respondent submitted financial records to the ED for an analysis of its inability to pay the recommended administrative penalty. However, pursuant to TCEQ policy, Respondent did not qualify for such an analysis.
26. Respondent did not intentionally violate state law regulating USTs.
27. Respondent brought the USTs into compliance with state law and exhibited good faith in responding to this enforcement action.
28. Respondent has the ability to pay the recommended administrative penalty if paid out over three years.

## **II. CONCLUSIONS OF LAW**

1. Under TEX. WATER CODE §§ 7.051 and 7.073, the Commission may assess an administrative penalty against any person who violates a provision of the Texas Water Code or of the Texas Health and Safety Code within the Commission's jurisdiction or who violates a Commission administrative rule, order, or permit, and also may order the violator to take corrective action.

2. SOAH has jurisdiction over matters related to the hearing in this matter, including the authority to issue a Proposal for Decision with Findings of Fact and Conclusions of Law, pursuant to TEX. GOV'T CODE ch. 2003.
3. Respondent is subject to the jurisdiction of the Commission in regard to the operation of petroleum storage tanks, including petroleum USTs, pursuant to TEX. WATER CODE § 5.013.
4. Respondent timely requested a contested case hearing, pursuant to 30 TEX. ADMIN. CODE (TAC) § 70.105.
5. Respondent received sufficient notice of the hearing on the alleged violations and the recommended penalties and corrective actions, pursuant to TEX. GOV'T CODE, §§ 2001.051(1) and 2001.052; TEX. WATER CODE § 7.058; and 30 TAC §§ 1.12, 39.25, 70.104, and 80.6(c).
6. Based on the above Findings of Fact, Respondent violated TEX. WATER CODE § 26.3475(a), (c)(1), (c)(2), and (d); and 30 TAC §§ 334.49(b)(2) and (c)(4), 334.50(b)(1)(A), (b)(2)(A)(i)(III), (b)(2)(A)(ii), and (d)(1)(B)(ii), 334.51(a)(6), and 334.45(c)(3)(A).
7. The ED's recommended penalty properly considered the factors required by TEX. WATER CODE, § 7.053, including: Its impact or potential impact on public health and safety, natural resources and their uses, and other persons; the nature, circumstances, extent, duration, and gravity of the prohibited act; the history and extent of previous violations by the violator; the violator's degree of culpability, good faith, and economic benefit gained through the violation; the amount necessary to deter future violations; and any other matters that justice may require.
8. Based on consideration of the above Findings of Fact, the elements set forth in TEX. WATER CODE §§ 7.052 and 7.053, and the Commission's Penalty Policy, the ED

correctly calculated the penalties for each of the alleged violations, resulting in a total administrative penalty of \$8,868.

9. The ED met his burden of proof to show an administrative penalty of \$8,868 is warranted for the violations found and should be assessed against Respondent.
10. Respondent failed to meet his burden of proof to establish its inability to pay the recommended administrative penalty, pursuant to 30 TAC § 70.8.

**NOW, THEREFORE, IT IS ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, IN ACCORDANCE WITH THESE FINDINGS OF FACT AND CONCLUSIONS OF LAW, THAT:**

1. Respondent is assessed an administrative penalty in the amount of \$8,868 for violations of TEX. WATER CODE § 26.3475(a), (c)(1), (c)(2), and (d); and 30 TAC §§ 334.49(b)(2) and (c)(4), 334.50(b)(1)(A), (b)(2)(A)(i)(III), (b)(2)(A)(ii), and (d)(1)(B)(ii), 334.51(a)(6), and 334.45(c)(3)(A).
2. Respondent shall pay \$2,895.33 each year for three years.
3. The payment of this administrative penalty and Respondent's compliance with all the terms and conditions set forth in this Order will completely resolve the matters set forth by this Order. The Commission shall not be constrained in any manner from requiring corrective actions or penalties for other violations that are not raised here. All checks submitted to pay the penalty assessed by this Order shall be made out to "Texas Commission on Environmental Quality." Administrative penalty payments shall be sent with the notation "Re: D.C.T.D, Inc. d/b/a/ Boomers; Docket No. 2009-1334-PST-E" to:

Financial Administration Division, Revenues Section  
Attention: Cashier's Office, MC 214  
Texas Commission on Environmental Quality  
P.O. Box 13088  
Austin, Texas 78711-3088

4. The ED may refer this matter to the Office of the Attorney General of the State of Texas for further enforcement proceedings without notice to Respondent if the ED determines that Respondent has not complied with one or more of the terms or conditions in this Commission Order.
5. All other motions, requests for entry of specific Findings of Fact or Conclusions of Law, and any other requests for general or specific relief, if not expressly granted herein, are hereby denied.
6. The effective date of this Order is the date the Order is final, as provided by TEX. GOV'T CODE § 2001.144 and 30 TAC § 80.273.
7. The Commission's Chief Clerk shall forward a copy of this Order to Respondent.
8. If any provision, sentence, clause, or phrase of this Order is for any reason held to be invalid, the invalidity of any provision shall not affect the validity of the remaining portions of this Order.

**ISSUED:**

**TEXAS COMMISSION ON ENVIRONMENTAL QUALITY**

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**Bryan W. Shaw, Ph. D., Chairman**  
**For the Commission**

